[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 742

BERTHA MEYER SMITH, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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[fols. 1–5] Citation in usual form, showing service on J. J. Crossley, filed Oct. 26, 1932, omitted in printing.

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

L-10639

BERTHA MEYER SMITH, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

[fol. 7] COMPLAINT—Filed May 22, 1929

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I

That at all times hereinafter mentioned, plaintiff was and now is a resident and inhabitant of the State of Oregon, and this residence is bona fide and continuous.

II

That plaintiff was the mother of one Elias Melvin Zimmerman, who enlisted with the United States Navy on or about March 18, 1914, at Portland, Oregon, as an apprentice seaman, and thereafter served in said U. S. Navy until March 17, 1918, when he received an honorable discharge therefrom, holding the rating of boatswains mate, second class, and reenlisted at the Naval Recruiting Station, New York City, N. Y., on March 18, 1918, and served thereafter until September 15, 1919, when he was honorably discharged from said Naval Service, and reenlisted on September 16, 1919, and thereafter served in said Navy until the date of his death, on June 30, 1921.

[fol. 8] III

That on or about the 3rd day of December, 1917, said Elias Melvin Zimmerman, made application for and re-

ceived a policy of War Risk Insurance in the sum of Ten Thousand ($10,000.00) Dollars, naming plaintiff as his beneficiary, and upon said application for said policy of War Risk Insurance, authorized the necessary monthly deductions from his pay, or if insufficient, from any money on deposit with the United States, in payment of the premiums on said policy of War Risk Insurance as they became due, unless otherwise paid, said policy conditioned that the said defendant would pay to the said beneficiary named therein, the sum of $57.50 per month for the full period of twenty (20) years, or two hundred and forty (240) months, and thereafter said policy remained in full force and effect until the date of the death of said Elias Melvin Zimmerman, by reason of said authorized deductions, as directed by said Elias Melvin Zimmerman in his application for said policy of War Risk Insurance.

IV

That said Elias Melvin Zimmerman died while aboard the U. S. Naval Vessel, "Conestoga."

V

That heretofore this plaintiff applied for the benefits accruing to her as beneficiary under the said policy of War [fol. 9] Risk Insurance, but the defendant disagreed, and failed and refused to make payment of said benefits accruing to this plaintiff, and now fails and refuses to make said payments, and a disagreement now exists between said plaintiff and said defendant with respect to said payments due under said policy of War Risk Insurance.

Wherefore, plaintiff prays for judgment that she receive the benefits accruing under the War Risk Insurance Policy of said Elias Melvin Zimmerman, from the 30th day of June, 1921, to this date, as made and provided by law.

B. A. Greene, Joseph Meyer, Attorneys for Plaintiff.

Duly sworn to by Bertha Meyer Smith. Jurat omitted in printing.

[fol. 10] STATE OF OREGON,
County of Multnomah, ss:

Due service of the within Complaint is hereby accepted in Multnomah County, Oregon, this 22nd day of May, 1929,

by receiving a copy thereof, duly certified to as such by B. A. Green of attorney for plaintiff.

George Neuner, U. S. Attorney, Attorney for Defendant, by Chas. W. Erskine, Asst. U. S. Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed Aug. 3, 1929

Comes now the United States of America, by George Neuner, United States Attorney for the District of Oregon, and Livy Stipp, Assistant United States Attorney, and for answer to plaintiff's complaint, admits, denies, and alleges as follows:

[fol. 11] I

Alleges that defendant herein has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of any of the allegations contained in Paragraph I of plaintiff's complaint and, therefore, denies the same and puts the plaintiff on proof thereof.

II

Admits each and every allegation of Paragraph II of plaintiff's complaint, except defendant alleges that it has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of the allegations "that plaintiff was the mother of one Elias Melvin Zimmerman" and that Elias Melvin Zimmerman died on June 30, 1921, and, therefore, denies the same and puts the plaintiff on proof thereof.

III

Denies each and every allegation contained in paragraph III of plaintiff's complaint, except it admits that on December 3, 1917, the insured applied for and was granted war risk insurance in the amount of Ten Thousand ($10,000,00) Dollars, payable in monthly installments of $57.50 each in the event of his death or permanent and total disability occurring while the contract was in force or effect and that

insured designated as beneficiary of said insurance one [fol. 12] Bertha Meyer Smith, described as mother.

IV

Alleges that defendant herein has no knowledge or information sufficient to enable it to form a belief as to the truth or falsity of any of the allegations contained in paragraph IV of plaintiff's complaint and, therefore, denies the same and puts the plaintiff on proof thereof.

V

Admits each and every allegation contained in paragraph V of plaintiff's complaint.

For its first further and separate answer and defense, defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

[fol. 13] III

That insured in his application for insurance stated as follows:

"I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in paragraph III hereof, premiums on insured's war risk insur-

ance were deducted from his service pay during his first enlistment, until March, 1918, but not thereafter.

V

That thereafter upon insured's enlistment on March 18, 1918, and again on September 16, 1919, he did not authorize the disbursing officer of the Navy Department to deduct premiums for his war risk insurance from his service pay, nor did insured apply for a new contract of war risk insurance as provided by Section 40 of the War Risk Insurance Act.

VI

That from the date of insured's second enlistment, namely: March 18, 1918, until June 30, 1921, he knowingly received full pay from the Navy Department without deduction of any amount for premiums upon his war risk [fol. 14] insurance, all of which the insured well knew.

VII

That by reason of insured accepting his full pay with full knowledge that premiums upon his war risk insurance were not deducted therefrom as hereinbefore set forth, he thereby revoked his original authorization to deduct premiums from his service pay and cancelled his said policy of war risk insurance as of April 30, 1918, and the same was not in force and effect thereafter.

For a second further and separate answer and defense, defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

[fol. 15] III

That insured in his application for insurance stated as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in Paragraph III hereof, premiums on insured's war risk insurance were deducted from his service pay during his first enlistment until March, 1918, but not thereafter.

V

That thereafter upon insured's enlistment on March 18, 1918, and again on September 16, 1919, he did not authorize the disbursing officer of the Navy Department to deduct premiums for his war risk insurance from his service pay, nor did insured apply for a new contract of war risk insurance as provided by Section 400 of the War Risk Insurance Act.

VI

That by reason of insured being discharged from the Navy on March 17, 1918, his authorization to deduct premiums on his war risk insurance from his service pay ter-
[fol. 16] minated with said enlistment and it become necessary for insured upon his reenlistment to issue a new authorization for the deduction of premiums.

VII

Therefore his war risk insurance lapsed for nonpayment of premium due April 30, 1918, and was not in force and effect thereafter.

For a third, further and separate answer and defense, the defendant alleges as follows:

I

That Elias Melvin Zimmerman, hereinafter called the "insured," enlisted in the United States Navy on March

18, 1914, and was honorably discharged therefrom on March 17, 1918, and re-enlisted on March 18, 1918, and was discharged September 15, 1919, and re-enlisted on September 16, 1919, and served in said Navy until June 30, 1921.

II

That on December 3, 1917, the insured applied for and was granted war risk insurance in the sum of $10,000 and designated one Bertha Meyer Smith, described as mother, as the beneficiary.

III

That insured in his application for insurance stated as follows:

[fol. 17] "I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be paid otherwise."

IV

That pursuant to said authorization as set forth in paragraph III hereof, premiums on insured's war risk insurance were deducted from his service pay during his first enlistment until March, 1918, but not thereafter.

V

That before January 1, 1921, the Navy Department issued Navy Circular No. 14, which discontinued the method of deducting premiums for war risk insurance from service pay and in its place an allotment system was installed whereby it became necessary for any person in the naval service to make such allotment for the payment of premiums upon his war risk insurance.

VI

That insured did not execute an allotment or authorization of the payment of insurance premiums through the Navy Department as required by Circular No. 14.

VII

That by reason of insured not complying with Circular [fol. 18] No. 14, his war risk insurance lapsed on January

1, 1921, for non-payment of the premium due on that date, if his said insurance was in force to January 1, 1921.

Wherefore, defendant having fully answered plaintiff's complaint, demands that plaintiff take nothing thereby and that the defendant go hence without day and recover of and from the plaintiff its costs and disbursements herein.

George Neuner, United States Attorney for the District of Oregon; Livy Stipp, Assistant United States Attorney.

Duly sworn to by Livy Stipp. Jurat omitted in printing.

[fol. 19] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REPLY—Filed April 20, 1931

Comes now the plaintiff herein and for reply to the defendant's answer admits, denies and alleges as follows, to-wit:

I

Plaintiff for reply to the allegations of Paragraph II of defendant's answer, states that the Navy Department itself has recognized the plaintiff herein as the mother of the insured, Elias Melvin Zimmerman, and on May 25, 1931, the Navy Department informed the plaintiff herein that noth-
[fol. 20] ing whatever had been heard from her son, the insured, Elias Melvin Zimmerman, since March 25, 1921, and on July 8, 1921, the Navy Department advised Bertha Meyer Smith, the plaintiff herein, and the mother of the insured, that her son, the insured, lost his life at sea while in the service of the United States, in the following words:

"Your son, Elias Melvin Zimmerman, First Boatswain's Mate USN will now appear on the records of the Navy Department as having lost his life on board the U.S.S. Conestoga as of June 30, 1921."

II

That the plaintiff herein for reply to the allegations of paragraph IV of defendant's answer alleges that some-

time shortly after the 1st of January, 1921, the insured was transferred to the U.S.S. Conestoga and no knowledge or information was ever heard from him or of him after March 25, 1921, and under date of July 8, 1921, the Navy Department Bureau of Navigation at Washington, D. C., notified this plaintiff that her son, the insured, lost his life on board the U.S.S. Conestoga as of June 30, 1921, in the following words:

"Your son, Elias Melvin Zimmerman, First Boatswain's Mate USN will now appear on the records of the Navy Department as having lost his life on board the U.S.S. [fol. 21] Conestoga as of June 30, 1921."

Plaintiff for reply to the defendant's first, further and separate answer and defense admits, denies and alleges as follows, to-wit:

I

That plaintiff admits the allegations of paragraph I of defendant's first, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of the defendant's first, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of the defendant's first, further and separate answer and defense.

IV

Plaintiff admits the allegations of paragraph IV of defendant's first, further and separate answer and defense, except the words "but not thereafter" appearing in line 11 of page 3 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender [fol. 22] (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provision contained in Bulletin No. 1

of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

Plaintiff in reply to paragraph V of defendant's first, further and separate answer and defense, alleges that at the time the insured applied for his insurance on December 3, 1917, copy of which application for insurance is attached hereto marked Exhibit "A" and made a part hereof, he complied with the regulations of the War Risk Insurance Bureau Bulletin No. 1 issued pursuant to the provisions of Section 402 of the Act of October 6, 1917, 40 Statutes 409 and in force at the time the Certificate of insurance was issued to Elias Melvin Zimmerman contained the following regulations relative to the payment of premiums:

"Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient [fol. 23] to provide the premium, provided the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate but may be re-instated within six months upon compliance with the terms and conditions specified in the regulations of the Bureau"; and also,

"In case the applicant does not desire the premium to be deducted from his pay or his deposit, he should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deductions from his pay or if such pay be insufficient, any balance from his deposit";

That at the time of the expiration of his first enlistment, to-wit on March 17, 1918, a sufficient deduction had been made from his pay to carry his insurance to well within the

period of his new enlistment, to-wit, June 2, 1918; that the insured we receiving a monthly pay of not less than $44.00 and continued at that rate during all the period of said second term of enlistment and under his third term of enlistment, he was receiving a monthly pay of not less than $140.00; that said pay was at all times more than sufficient [fol. 24] to pay any and all premiums when due; that Elias Melvin Zimmerman, the insured, at the time of his application for insurance, gave an order contained in his application for insurance directing that all premiums as they become due should be deducted from his pay or from any deposit he had with the United States, which order was in words as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient from any deposit with the United States in payment of the premiums as they become due, unless they be paid otherwise."

That said order of the insured was never revoked either in writing or otherwise; that on March 17, 1918 and during all subsequent time of his service there was in force, the following regulations of the War Risk Insurance Bureau, to-wit:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in the active military or naval service, and premiums therefore are authorized to be deducted from the insured's pay or deposit." T. D. 33 W. R. September 20, 1918. Also:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premiums while the insured is in active mili- [fol. 25] tary or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided." T. D. 44 W. R. May 17, 1919;

And that during all of said time up to the date of his death, the insured was in the active naval service of the United States.

VI

Plaintiff for reply to paragraph VI of defendant's first, further and separate answer and defense denies each and

every allegation thereof and plaintiff alleges that on the contrary, the insured absolutely believed that his insurance was in force and that payments of premiums were being deducted from his pay and while on leave of absence during December, 1920 and January, 1921, the insured in conversation with numerous friends, frequently asserted that he was keeping up his insurance and his insurance premium was being deducted from his pay.

VII

Plaintiff for reply to paragraph VII of defendant's first, further and separate answer and defense, denies that the insured revoked his order to deduct from his pay or that the acceptance of his pay in full, if he did so accept such pay, did revoke the order to deduct from his pay or from any deposit he had with the United States; the regulations governing the cancellation of War Risk Insurance provided [fol. 26] that such cancellation, when an order had been given to deduct premiums from his pay or deposit, must be in writing and is as follows:

"The insurance granted under Article IV of the War Risk Insurance Act will not be permitted to lapse for nonpayment of premium while the insured is in the active military or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided:

(b) When the insured shall have been for a period of sixty days or more in a status in which no pay applicable to the payment of premiums shall have accrued provided such premiums have not been paid when due or within 31 days thereafter;

(c) Upon written request, duly witnessed and forwarded through military channels to the Bureau of War Risk Insurance, for cancellation of the insurance in whole or in part and corresponding cessation or reduction of the deductions of the premiums from his pay or deposit in which case the insurance shall terminate or be reduced as the case may be, on the regular monthly renewal date of the policy in the month following that in which the request is made, and the regular monthly deductions will accordingly be made from the insured's pay or deposit at the end of the

calendar month in which the request for cancellation is [fol. 27] made." T. D. 44 W. R. May 17, 1919. T. D. 48 W. R. September 29, 1919.

And plaintiff alleges that no written order was ever given revoking the order to deduct from his pay or deposit and that no written order was ever executed by the insured cancelling his insurance or any part thereof and plaintiff further alleges that there was no interval of time in which the insured was out of the active naval service of the United States for a period of sixty days or in fact for any time whatever from the beginning of his service until his death.

Plaintiff for reply to the defendant's second, further and separate answer and defense admits, denies and alleges as follows, to-wit:

I

Plaintiff admits the allegations of paragraph I of defendant's second, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of defendant's second, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of defendant's second, further and separate answer and defense.

[fol. 28]

IV

Plaintiff admits the allegations of paragraph IV of defendant's second, further and separate answer and defense, except the words "but not thereafter" appearing in line 24 of page 4 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provisions contained in Bulletin No. 1 of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

Plaintiff in reply to paragraph V of defendant's second, further and separate answer and defense, alleges that at the time the insured applied for his insurance on December 3, 1917, copy of which application for insurance is attached hereto marked Exhibit "A" and made a part hereof, he complied with the regulations of the War Risk Insurance Bureau; Bulletin No. 1 issued pursuant to the provisions of Section 402 of the Act of October 6, 1917, 40 Statutes 409 and in force at the time the Certificate of insurance was [fol. 29] issued to Elias Melvin Zimmerman contained the following regulations relative to the payment of premiums:

"Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the Bureau"; and also,

"In case the applicant does not desire the premium to be deducted from his pay or his deposit, he should so elect in writing at the time of making application; but if no election is made it shall have the effect to provide for such deductions from his pay or if such pay be insufficient, any balance from his deposit";

[fol. 30] That at the time of the expiration of his first enlistment, towit on March 17, 1918, a sufficient deduction had been made from his pay to carry his insurance to well within the period of his new enlistment, to wit, June 2, 1918; that the insured was receiving a monthly pay of not less than $44.00 and continued at that rate during all the

period of said second term of enlistment, and under his third term of enlistment, he was receiving a monthly pay of not less than $140.00; that said pay was at all times more than sufficient to pay any and all premiums when due; that Elias Melvin Zimmerman, the insured, at the time of his application for insurance, gave an order contained in his application for insurance directing that all premiums as they become due should be deducted from his pay or from any deposit he had with the United States, which order was in words as follows:

"I authorize the necessary monthly deduction from my pay, or if insufficient from any deposit with the United States in payment of the premiums as they become due, unless they be paid otherwise."

That said order of the insured was never revoked either in writing or otherwise; that on March 17, 1918 and during all the time of his service there was in force, the following regulations of the War Risk Insurance Bureau, to-wit:

"The insurance granted under Article IV of the War [fol. 31] Risk Insurance Act will not be permitted to lapse for non-payment of premiums while the insured is in active military or naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided." T. D. 44 W. R. May 17, 1919;

And that during all of said time up to the date of his death, the insured was in the active naval service of the United States.

VI

That plaintiff for reply to paragraph VI of defendant's second, further and separate answer and defense, denies the same and the whole thereof and plaintiff alleges that the insured was the holder of a Continuous Service Certificate showing continuous service from the date of his first enlistment to the date of his death and his application for insurance hereinbefore set forth covered his whole period of service from the date of his first enlistment to the date of his death, and particularly in view of the provisions of Section 2861 United States Compiled Statutes 1918 that

"An extension of the period of enlistment as hereinbefore authorized aggregating four years shall be held and considered as equivalent to continued service with respect to all rights, privileges and benefits granted for such services pursuant to law."

[fol. 32]

VII

Plaintiff for reply to the allegations of Paragraph VII denies the same and the whole thereof.

Plaintiff for reply to the defendant's third, further and separate answer and defense, admits, denies and alleges as follows, to-wit:

I

That plaintiff admits the allegations of paragraph I of defendant's third, further and separate answer and defense.

II

Plaintiff admits the allegations of paragraph II of the defendant's third, further and separate answer and defense.

III

Plaintiff admits the allegations of paragraph III of defendant's third, further and separate answer and defense.

IV

Plaintiff admits the allegations of paragraph IV of defendant's third, further and separate answer and defense, except the words "but not thereafter" appearing in line 5 of page 6 of defendant's answer and as to that allegation, plaintiff alleges that pursuant to the regulations issued by the Bureau of War Risk Insurance, insured made the order contained in his application and that by reason of such [fol. 33] order and authorization of deductions from the insured's pay or deposit, it was the equivalent of tender (T. D. No. 48 W. R. Par. 6, September 29, 1918) and that by reason of the provision contained in Bulletin No. 1 of the War Risk Insurance Bureau, such premium would be treated as paid whether or not such deduction was in fact made.

V

That plaintiff for reply to the allegations of paragraph V of defendant's third, further and separate answer and

defense, denies the same, except as to the issuance of Navy Circular No. 14 by the Navy Department and as to this plaintiff has no knowledge or information sufficient to form a belief as to the truth or falsity thereof and therefore denies the same and puts the defendant on its proof and plaintiff further alleges that even though such a Circular was issued by the Navy Department, it was non-effective as to the contract of insurance between the Government and the insured, since the Secretary of the Treasury of the United States and the Director of the War Risk Insurance Bureau only had authority to make regulations as provided by Chapter 105, Section 13, 40 Statutes at Large, page 399, and the plaintiff denies that a regulations was made by the Secretary of the Treasury or the War Risk Insurance Bureau requiring that allotments be made to take the place and instead of the order [fol. 34] contained in his application to deduct premiums from pay or deposits; that Navy Circular No. 14 was not directed to the insured or ever brought to his attention and that no written request by the insured was ever made for the cancellation of his insurance, signed by him and attested as required by the directions contained in the provisions of Navy Circular No. 14.

VI

That plaintiff for reply to the allegations of paragraph VI of the defendant's third, further and separate answer and defense, denies the same and the whole thereof and alleges the facts to be that the insured had authorized the payment of insurance premiums by the terms of the order contained in his application for insurance, a copy of which is hereto attached marked Exhibit "A" and made a part hereof and that said order contained in his application for insurance authorized the payment and deduction of insurance premiums from his pay or deposits by way of allotment or otherwise.

VII

That the plaintiff for reply to the allegations of paragraph VII of defendant's third, further and separate answer and defense, denies the same and the whole thereof

and alleges that the insured was the holder of Continuous Service Certificate No. 49689 and was in his eighth year of continuous service; that by reason of the "authoriza-
[fol. 35] tion" of deductions from the insured's pay or execution of allotments from the insured's pay it was equivalent of tender. Section 6, T. D. 48 W. R. Sept. 29, 1919.

And by reason of such provisions and the order of insured, premiums were paid when due; and plaintiff further alleges that the insured was on leave of absence from the United States Navy during part of December, 1920 and during January, 1921 and reported for duty to the U. S. S. Charleston, on or about February 2, 1921 and was transferred to the U. S. S. Conestoga February 12, 1921 and served on that vessel until the date of his death, and that Navy Circular No. 14 issued just before or on or about January 1, 1921 by the Navy Department was never received by the insured and said Circular was never delivered to him or any knowledge of the contents thereof imparted to the insured; that from the beginning of insured's last enlistment on September 16, 1919 to the date of his death, he was of the rank of First Boatswain's Mate and was receiving pay of at least $140.00 per month and at all times had sufficient pay due him to meet the payments of insurance premiums of $6.50 per month on his insurance policy as authorized by the order contained in his application hereinbefore set forth; that the insured was in his third term of enlistment and had served thereunder one year and about four months before the issue of
[fol. 36] Navy Circular No. 14 by the Navy Department.

Wherefore, plaintiff prays for relief as in her original complaint.

J. J. Crossley, Joseph Meyer, Attorneys for Plaintiff.

Duly sworn to by Bertha Meyer Smith. Jurat omitted in printing.

EXHIBIT "A" TO REPLY

Treasury Department

C-72.5216 6,50 924898. Dec. 28, 1917

Bureau of War Risk Insurance

Division of Military and Naval Insurance

Form 2A

Navy Disbursing, Washington, D. C.

Application for Insurance

[fol. 37] My full name is (Given) Elias, (Middle) M., (Last name) Zimmerman.

Home address (No. and street or rural route) 490 E. Pine Street, (City, town, or post office) Portland, (State) Oregon.

Date of birth (Month) March, (Day) 12, (Year) 1895, (Nearest birthday) Age 23.

Date of last enlistment or entry into active service (Give month, day, and year) March 18, 1914.

I hereby apply for insurance in the sum of $10,000, payable as provided in the Act of Congress approved October 6, 1917, to myself during permanent total disability and from and after my death to the following persons in the following amounts:

Relationship to me	Name of Beneficiary (Given)	(Middle)	(Last Name)	Post office address (a) No. and street or rural route (b) City, town, or post office and state	Amount of insurance for each beneficiary (In multiple of $500 only)
Mother	Bertha	Meyer	Smith	(a) 490 E. Pine St.	
				(b) Portland, Ore.	$10,000
				(a)	
				(b)	

In case any beneficiary die or become disqualified after becoming entitled to an installment, but before receiving all installments, the remaining installments are to be paid to such person or person- within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

[fol. 38] I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this application is for less than $4,500 insurance and in favor of wife, child, or widowed mother, I offer it and it is to be deemed made as of February 12, 1918.

If this application is for less than $4,500 insurance and in favor of some person or person other than wife, child, or widowed mother, I offer it and it is to be deemed made as of (Date of signature)

[February 12, 1918]*

Strike out which ever is not wanted.

NOTE.—If in the last paragraph you strike out "Date of signature" leaving "February 12, 1918," the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your widow, child, or widowed mother for not to exceed 240 months less payments made to you while living, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child, or widowed mother is effective only if you die on or after February 12, 1918.

If you strike out "February 12, 1918," leaving "Date [fol. 39] of signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

To whom do you wish policy sent? (Name) Bertha Meyer Smith. (Address) 490 E. Pine Street, Portland, Oregon.

Signed at (on board) U. S. S. New Orleans, the 3 day of December, 1917.

Witnessed by: Wm. Haight, Rank: Ensign U. S. N., U. S. S. New Orleans.

Sign here: E. M. Zimmerman. (Organization:) U. S. Navy. (Rank or rating:) Cox.

---

*Words and figures enclosed in brackets stricken in copy.

(Over)

War Risk Insurance

Dec. 28, 1917.

Div. Military and Naval

Monthly Premiums for Each $1,000 of Insurance

(Each $1,000 of Insurance yields $5.75 per month for 240 Months)

Age	Monthly premium	Age	Monthly premium
15	$0.63	40	$0.81
16	.63	41	.82
17	.63	42	.84
18	.64	43	.87
[fol. 25]			
19	.64	44	.89
20	.64	45	.92
21	.65	46	.95
22	.65	47	.99
23	.65	48	1.03
24	.66	49	1.08
25	.66	50	1.14
26	.67	51	1.20
27	.67	52	1.27
28	.68	53	1.35
29	.69	54	1.44
30	.69	55	1.53
31	.70	56	1.64
32	.71	57	1.76
33	.72	58	1.90
34	.73	59	2.05
35	.74	60	2.21
36	.75	61	2.40
37	.76	62	2.60
38	.77	63	2.82
39	.79	64	3.07
		65	3.35

Insurance may be applied for in favor of one or more of the following persons with sum of $500 or a multiple thereof for each beneficiary, the aggregate not exceeding

the limit of $10,000 and not less than $1,000 upon any one life:

[fol. 41] Husband or wife.

Child, including legitimate child; child legally adopted before April 6, 1917, or more than six months before enlistment or entrance into or employment in active service, whichever date is the later; stepchild, if a member of the insured's household; illegitimate child, but, if the insured is his father, only if acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child's support, and if such child, if born after December 31, 1917, shall have been born in the United States or in its insular possessions.

Grandchild, meaning a child, as above defined, of a child as above defined.

Parent, including father, mother, grandfather, grandmother, stepfather and stepmother, either of the insured or of his/her spouse.

Brother or sister, including of the half blood as well as of the whole blood, stepbrothers and stepsisters and brothers and sisters through adoption.

1 December 1917.

Recorded this date by me. Checkage of premium ($6.50) will be made by me monthly from date of application.

First checkage made 1 December 1917 for $6.50.

[fol. 42] R. B. Bristol, Asst. Paymaster, U. S. N.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed Aug. 9, 1932

This action having comes on regularly to be heard on March 2, 1932, the plaintiff being represented by J. J. Crossley, her attorney, and the defendant being represented by George Neuner, United States Attorney for the District of Oregon, by Rex Kimmel, Assistant United States Attorney, as its attorney; and having been stipulated in open

court that both parties waive a jury and agreed to present the matter to the court for determination upon a stipulation as to the facts, the sole question being whether at the time of the death of the insured the insurance was in force [fol. 43] and the respective counsel having presented their arguments to the court and having asked and secured permission to do so thereafter presented their briefs to the court on behalf of the respective contentions and the court being now fully advised in the premises makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. That at all times mentioned in the pleadings the plaintiff, Bertha Meyers Smith, was and is now a citizen of the United States, a resident and inhabitant of the State of Oregon and such residence is bona fide and continuous.

2. That the plaintiff was and is the mother of one Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, who enlisted with the United States Navy on or about March 18, 1914 at Portland, Oregon, as an apprentice seaman and thereafter served in said United States Navy until and including March 17, 1918 when he received an honorable discharge therefrom holding the rating of Boatswain Mate, 2nd Class, and re-enlisted at the Navy Recruiting Station in New York City, New York, on March 18, 1918 and served thereafter until and including September 15, 1919 when he was honorably discharged from said naval service and re-enlisted on September 16, 1919 and thereafter served continuously in said Navy until the day of his death on [fol. 44] June 30, 1921 and said Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, was the holder of a continuous service certificate No. 49,689.

3. That on or about the 3d day of December, 1917, Elias Melvin Zimmerman, the same identical person as Elias M. Zimmerman and E. M. Zimmerman, made application for and was granted a policy of War Risk Insurance in the amount of Ten Thousand and $10,000.00 Dollars, payable in monthly installments of Fifty-seven and 50/100 ($57.50) Dollars each in the event of his death or permanent and total disability occurring while the contract was in force

or effect and that the insured designated as beneficiary of said insurance one Bertha Meyers Smith, described as mother.

4. That said Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while aboard the United States Naval Vessel Conestoga sometime between the 25th day of March and the 30th day of June, 1921 while in the naval service of the United States.

5. That heretofore the plaintiff applied for the benefits accruing to her as beneficiary under the said policy of War Risk Insurance, but the defendant disagreed, failed and refused to make payment of said benefits accruing to this [fol. 45] plaintiff and now fails and refuses to make said payments and disagreement now exists between said plaintiff and said defendant with regard to said payments due under said policy of War Risk Insurance.

6. That pay was due Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, for each and every day from and including March 18, 1914 to the official date of his death, June 30, 1921.

7. That the application for insurance with the Bureau of War Risk Insurance of the Treasury Department, together with the certificate of insurance which was issued to Elias Melvin Zimmerman, the same and identical person as Elias M. Zimmerman and E. M. Zimmerman under the authority of the acts of Congress was granted subject to the payment of premiums and was also subject to all regulations promulgated under said acts, then or thereafter in force, all of which together with the terms and conditions published under authority of the act constituted the contract.

8. The application for insurance contained the following provisions with reference to payment of premiums: "I authorize the necessary monthly deductions from my pay or if insufficient from any deposit with the United States in payment of the premiums as they become due unless they be otherwise paid."

[fol. 46] 9. During the period from December 3, 1917 to the date of his first re-enlistment monthly premiums of

$6.50 each were deducted the last deduction covering the installment of premiums due for the month of April, 1918, but subsequent to the re-enlistment of March 18, 1918 no deductions were made.

10. The sailor did not revoke the authority contained in his application for insurance or in any way indicate to the Government or to the Naval authorities his election to pay the premiums in any other manner than the deductions from pay or that he desired to let his insurance lapse. Following his first re-enlistment he received his pay monthly in full without any deductions for the monthly installments of premium.

11. At the time of his first re-enlistment on March 18, 1918 and at the time of his second re-enlistment on September 16, 1919, it does not appear that Zimmerman signed any papers whatever for the purpose of renewing previous authorization of deduction from pay for his yearly renewable term insurance and I find no statute or regulation requiring the insured to renew the authority which in his application he had conferred upon the Government to deduct the premiums from his pay, Zimmerman having a continuous service certificate.

12. Bulletin No. 1 issued pursuant to provisions of Section 402 of the Act of October 6, 1917, 40 Stat. 409, and in [fol. 47] force at the time the certificate of insurance was issued to Zimmerman contained the following regulations relative to the payment of premiums: "Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period of grace the insurance shall remain in full force"; also "In case the applicant does not desire the premium to be de-

ducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

13. Treasury Decision 44 War Risk Insurance dated May 17, 1919 and Treasury Decision 48 War Risk Insurance dated September 29, 1919 provided specifically that "The yearly renewable term insurance will not be permitted to lapse for non-payment of premiums while the insured is in the active military servic and premiums there- [fol. 48] fore are authorized to be deducted from the insured's pay or deposit except as hereinafter provided" and there were no exceptions applicable to Zimmerman's case and Treasury Decision 48 of said War Risk Insurance dated September 29, 1919 further provided that "authorization of deductions from the insured's pay shall be equivalent of tender."

Conclusions of Law

Therefore, in conclusion I find that Zimmerman died June 30, 1921 while still in the service of the United States and that he had a continuous service certificate No. 49,689 and I rule that the policy of War Risk Insurance of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect at the time of the death of Zimmerman and that the petitioner and plaintiff in this case, Bertha Meyers Smith, is entitled to receive the installments due thereon up to this date as provided by law after deducting the premiums which the Government had previously failed to deduct, for which sum Judgment may be entered.

Dated this 9th day of August, 1932.

John H. McNary, Judge.

[fol. 49] [File endorsement omitted.]

In United States District Court

Verdict—Filed Aug. 9, 1932

The above entitled cause came on regularly to be heard on the 2nd day of March, 1932 before the Hon. John H.

McNary, Judge of the above entitled court, without the intervention of a Jury, the parties hereto having stipulated in open court to try said cause before the court without a Jury, plaintiff appearing in person and by her attorney, J. J. Crossley, and the defendant appearing by its attorney, Rex Kimmel, Assistant United States Attorney;

Whereupon, the court having read the stipulation of facts by the parties hereto and heard argument of counsel and having considered the briefs submitted by the respective counsel and now being fully advised in the premises, finds a verdict in favor of the plaintiff and against the defendant and that at the time of the death, on June 30, 1921, of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, his policy of War Risk Insurance was in full force and effect [fol. 50] and the plaintiff herein named as beneficiary in said War Risk Insurance policy is entitled to recover the installments due from June 30, 1921 to this date.

Dated this 9th day of August, 1932.

John H. McNary, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed Aug. 9, 1932

The above entitled cause come on regularly to be heard on the 2nd day of March, 1932, before the Hon. John H. McNary, Judge of the above entitled court, without the intervention of a Jury, the parties hereto having stipulated and agreed in open court to try said cause before the court without a Jury and upon a stipulation of facts, the plaintiff appearing in person and by her attorney, J. J. Crossley, [fol. 51] and the defendant appearing by its attorney, Rex Kimmell, Assistant United States Attorney, and the court having considered the stipulation of facts and having heard the argument of the respective counsel and having made and entered a general verdict herein in favor of the plaintiff and against the defendant and having found in Findings of Fact and Conclusions of Law that the said War Risk Insurance policy of Elias Melvin Zimmerman,

who is the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect on the date of his death, June 30, 1921, and that the plaintiff in this case who was named as beneficiary in said War Risk Insurance policy is entitled to the installments due on said $10,000.00 War Risk Insurance policy from June 30, 1921 to this date:

Now, therefore, the court being advised in the premises and according to said verdict, Findings of Fact and Conclusions of Law filed herein does enter his Judgment and

It is ordered and adjudged, That Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while in the service of the United States and while holding a continuous service certificate No. 49,689 on the 30th day of June, 1921 and that on the date of his death his War Risk Insurance policy for $10,000.00 was in full force and effect and judg-
[fol. 52] ment is entered herein in favor of the plaintiff, Bertha Meyers Smith, beneficiary and mother named in said War Risk Insurance policy, and against the defendant, United States of America and there is now due said Bertha Meyers Smith as such beneficiary upon such policy of War Risk Insurance which was carried by the said Elias Melvin Zimmerman and referred to in the complaint herein, the accrued payments of Fifty-seven and 50/100 ($57.50) Dollars per month for each month subsequent to the date of the death of said Elias Melvin Zimmerman, to-wit the 30th day of June, 1921, until this date, and

It is further ordered and adjudged, That there be and is hereby allowed to said plaintiff's attorney, J. J. Crossley, as a reasonable attorney's fee herein, ten (10%) per cent of the amount recovered by the plaintiff herein, that is to say 10% of each payment the plaintiff shall hereunder and hereafter collect from such insurance to be paid to J. J. Grossley by the Veterans Bureau of the United States out of the payments to be made under this judgment at the rate of one-tenth (1/10) of each of such payments;

And it is so ordered.

Dated this 9 day of August, 1932.

John H. McNary, Judge.

[fol. 53] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed Feb. 21, 1933

Be it remembered that this cause came on regularly for trial on Wednesday, March 2, 1932, in the above-entitled Court before Honorable John H. McNary, District Judge, presiding, Plaintiff appearing by her counsel, J. J. Crossley, Esq., defendant appearing by Assistant United States Attorney Rex Kimmell. The jury having been waived, the case was tried before the Court and thereupon the following proceedings were had, to-wit: In connection with the statements of counsel for the respective parties, the following facts were stipulated and agreed upon:

STIPULATION OF FACTS

Plaintiff, Bertha Myers Smith, was the mother of one Elias Melvin Zimmerman, and beneficiary designated in the War Risk Insurance policy of said Elias Melvin Zimmerman.

That at all times mentioned in the pleadings, the plaintiff was and she now is a citizen of the United States and [fol. 54] a resident and inhabitant of the State of Oregon.

Elias Melvin Zimmerman enlisted in the United States Navy on March 18, 1914, at Portland, Oregon, as an apprentice seaman and that he served throughout such enlistment and was honorably discharged therefrom at the expiration thereof on March 17, 1918; that he re-enlisted in the United States Navy on March 18, 1918, and served throughout such enlistment and received an honorable discharge therefrom on September 15, 1919; that he re-enlisted on September 16, 1919, and served thereafter until the date of his death, June 30, 1921.

That Elias Melvin Zimmerman is holder of Continuous Service Certificate No. 49689.

That on the 3rd day of December, 1917, Elias Melvin Zimmerman made application for and was granted a policy of War Risk Insurance in the amount of $10,000, and that at the time of his application for such insurance, Elias Melvin Zimmerman authorized deductions to be made from his navy pay for the purpose of paying the monthly premiums on his insurance policy in the following words:

"I authorize the necessary monthly deduction from my pay, or if insufficient, from any deposits with the United

States in payment of the premiums as they become due, [fol. 55] unless they be otherwise paid."

That deductions were made from the pay of Elias Melvin Zimmerman until the expiration of his first enlistment, by which deductions premiums were paid on his insurance policy to and including the month of March, 1918. That thereafter no further deductions for the payment of insurance premiums were made; no further authority for deductions executed and no further premiums ever paid on such insurance.

That pay was due Elias Melvin Zimmerman for each and every day from and including March 18, 1914, to the official date of his death, June 30, 1921.

That at the time of his discharge on March 17, 1918, and on September 15, 1919, Elias Melvin Zimmerman was paid all the money then due him by the defendant.

That at the time of his death, June 30, 1921, pay was due Elias Melvin Zimmerman, which was later paid to the plaintiff.

War Risk Circular No. 14, S. & A. Circular letter 121-1920, dated October 20, 1920, was issued by the Navy Department, Bureau of Supplies and Accounts, Washington, D. C., on that date.

That in passing upon the question at issue the Court may consider as evidence the depositions and exhibits previously filed in the case.

[fol. 56] LIST OF EXHIBITS

The following exhibits were admitted in evidence by Stipulation:

Exhibit 1, Bulletin No. 1, War Risk Insurance Bureau.

Exhibit 2, Application for insurance of Elias Melvin Zimmerman, dated December 3, 1917.

Exhibit 3, Treasury Decision No. 33—War Risk Insurance, dated September 20, 1918.

Exhibit 4, Treasury Decision No. 44—War Risk Insurance, dated May 17, 1919.

Exhibit 5, Treasury Decision No. 48—War Risk Insurance, dated September 29, 1919.

Exhibit 6, Letter of Navy Department, dated May 25, 1921. (Included in Stipulation of facts.)

Exhibit 7, Letter of Navy Department, dated July 8, 1921. (Included in Stipulation of facts.)

It was further Stipulated that a disagreement exists between plaintiff and defendant.

Thereafter the following proceedings were had:

"Mr. Kimmell: The record shows there was deduction for the first enlistment for premiums.

Court: I think the service should be considered as continuous. The question is whether the Government should [fol. 57] have deducted the premiums. Of course, payments made to the month after his death would be after the policy had matured. I think you should tender the amount of the premiums, whatever they were.

Mr. Crossley: Of course, it is over ten years since he lost his life.

Court: Yes, but up to the time of his death, when the policy matured, to 1921.

Mr. Crossley: June 30, 1921. If you- Honor please, I think I would like to add an amendment to our complaint. I think there are five paragraphs and the sixth I would like to add, that plaintiff hereby makes tender of all premiums that may have been due, if any were due on the 18th day of March, 1918, to the 30th day of June, 1921.

The Court: Yes."

STIPULATION AS TO FACT IN CONTROVERSY

It was further stipulated and agreed that there was one fact only in controversy, namely: was the War Risk Insurance Policy applied for and obtained by Elias Melvin Zimmerman on December 3, 1917, in force and effect and unterminated on June 30, 1921.

The deposition of Lieutenant Walter Dismukes, taken and filed on behalf of the defendant in Washington, D. C., on December 2, 1929, in addition to the matters stipulated [fol. 58] and agreed upon, was in substance as follows:

I am at present in charge of the retainer division, Bureau of Supplies and Accounts, Navy Department, Washington, D. C., and in such capacity have access to the records relating to enlisted men in the United States Navy;

that I have searched such records for the purpose of ascertaining what was disclosed by the records of the enlistments of Elias Melvin Zimmerman. The Navy Department records relating to Elias Melvin Zimmerman, disclose that he never made any allotment for War Risk Insurance Premiums other than the authorization for deduction of premiums at the time of his application for insurance.

I further examined the records of the enlisted personnel aboard the United States Ship "Conestoga" with reference to Elias Melvin Zimmerman, and found that the record shows that twelve members of the crew of that ship executed allotments for the payment of premiums on War Risk Insurance, but that no allotment was executed by Zimmerman.

Thereafter the Court took the matter under advisement.

Within the time allowed by law, defendants requested the Court, prior to rendering judgment in said action, to make [fol. 59] the following Findings of Fact and Conclusions of Law and each of them, to-wit:

Defendant's Requested Findings and Conclusions

The Court, being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I

That at all times mentioned in the pleadings, plaintiff, Bertha Meyer Smith, was, and now is, a citizen of the United States and an inhabitant of the State of Oregon.

II

That plaintiff was the mother of one Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman.

III

That Elias M. Zimmerman enlisted in the United States Navy on March 18, 1914, and was honorably discharged therefrom on March 17, 1918; that he re-enlisted on March 18, 1918, and was regularly discharged at the termination of such enlistment on March 15, 1919; that he re-enlisted

on September 16, 1919, and served continuously thereafter until the date of his death, June 30, 1921.

IV

That on the 3d day of December, 1917, said Elias M. Zimmerman made application for and was granted a policy of [fol. 60] war risk insurance in the amount of $10,000, and that premiums were regularly paid thereon by authorized deduction from the service pay of said Elias M. Zimmerman each month to and including the month of March, 1918.

V

That plaintiff, Bertha Meyer Smith, was and is the beneficiary under said policy of insurance.

VI

That no premiums were paid on said policy of insurance, either directly by the insured or by deduction from insured's service pay, or otherwise, after the month of March, 1918.

VII

That a disagreement exists between the plaintiff and defendant.

VIII

That prior to June 30, 1921, said policy of insurance lapsed and terminated and ceased to exist.

Conclusions of Law

That plaintiff is not entitled to recover, for the reason that said Elias M. Zimmerman did not have a valid and unterminated policy of war risk insurance at the time of his death.

Dated at Portland, Oregon, this 8th day of August, 1932.

[fols. 61–67] That thereafter and prior to rendering judgment, the Court made the following Findings of Fact and Conclusions of law as requested by plaintiff, to-wit:

Findings of Fact and Conclusions of Law Omitted, printed side page 42, ante.

[fol. 68] DEFENDANT'S EXCEPTIONS TO COURT'S REFUSAL TO GRANT ITS REQUESTED FINDINGS AND CONCLUSIONS

Thereafter defendant excepted to the Court's refusal to grant its requested Findings of Fact and Conclusions of Law as follows, to-wit:

I

Defendant excepts to the Court's refusal to grant defendant's requested Finding of Fact No. 3, which was stipulated and agreed to by the parties.

II

Defendant excepts to the Court's refusal to grant defendant's requested Findings of Fact No. 6, which was stipulated and agreed to by the parties.

III

Defendant excepts to the Court's refusal to grant defendant's requested Finding of Fact No. 8, which was sustained by the facts stipulated and agreed to by the parties.

IV

Defendant excepts to the Court's refusal to make Defendant's requested Conclusion of Law No. 1, which is the proper deduction to be made by the Court as a matter of law from Defendant's requested Findings of Fact and the evidence stipulated and agreed to by the parties to said action.

DEFENDANT'S EXCEPTIONS TO FINDINGS AND CONCLUSIONS

Defendant excepted to the Findings of Fact and Conclu-
[fol. 69] sions of Law made by the Court as follows:

I

Defendant excepts to plaintiff's Finding of Fact No. 10, for the reason that the stipulated facts are that Elias Melvin Zimmerman neglected to pay any premiums on his policy of War Risk Insurance after March, 1918, and he neglected to make any authorization for the deduction of premiums from his pay or to execute an allotment for the

purpose of paying his insurance premiums after the termination of his first enlistment on March 17, 1918.

II

Defendant excepts to Finding of Fact No. 11, for the reason that there were statutes and regulations in effect requiring the insured to renew the authority to deduct premiums from his pay.

III

Defendant excepts to Findings of Fact No. 13, for the reason that no fact is stated therein and for the further reason that the Treasury decision referred to therein does not apply to the case of Elias Melvin Zimmerman.

IV

Defendant excepts to Finding of Fact and Conclusion of Law for the reason that Plaintiff is not entitled to prevail in this case and the same is not a proper conclusion of [fol. 70] law to be deducted from the evidence in this case.

The above exceptions were allowed by the Court.

Verdict and Judgment were rendered against the defendant herein on the 9th day of August, 1932, as follows:

Verdict omitted, printed side page 49, ante.

[fols. 71-72] Judgment omitted, printed side page 50, ante.

[fol. 73] Order Settling Bill of Exceptions

And now being willing that record should be made of said evidence and proceedings had in said cause, and within the time allowed by the rules of this Court and fixed by special orders made in this cause for settlement of defendant's Bill of Exceptions, I, John H. McNary, one of the Judges of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing Bill of Exceptions contains a full, true and correct statement in narrative form of all and the whole

[fol. 74] of the evidence taken and proceedings had upon the trial of the said action and said Bill of Exceptions likewise states the Exceptions taken and allowed by the Court on the trial of said action and I hereby settle and allow this Bill of Exceptions.

John H. McNary, District Judge.

Dated 2-21-1933.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR ORDER ALLOWING APPEAL—Filed Oct. 26, 1932

The above-named defendant, United States of America, conceiving itself aggrieved by the judgment filed and entered on the 9th day of August, 1932, in the above-entitled action, does hereby appeal from said judgment, and the whole thereof, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, for the reasons and upon the grounds specified in the assignments of error filed herewith, and prays that this, its appeal, be allowed; that a citation issue as provided by law, and that a [fol. 75] transcript of the record and proceedings of said cause, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, sitting at San Francisco, California.

Dated at Portland, Oregon, this 26 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed Oct. 26, 1932

Upon petition of the United States of America, defendant in the above-entitled cause,

It is ordered that the appeal of said defendant from the [fol. 76] judgment herein to the United States Circuit

Court of Appeals for the Ninth Circuit be, and the same is hereby, allowed.

Dated at Portland, Oregon, this 26 day of October, 1932.

John H. McNary, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed Oct. 26, 1932

To the above-named Plaintiff, Bertha Meyer Smith, and J. J. Crossley, her attorney:

You, and each of you, will take notice that the defendant, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment and decree made and entered in the above-entitled cause and court and signed by the Honorable John H. McNary, one of the judges of said District Court, on the 9th day of August, 1932, which judgment and [fol. 77] decree was and is to the effect that Elias Melvin Zimmerman, who is the same and identical person as Elias M. Zimmerman and E. M. Zimmerman, died while in the service of the United States and while holding a continuous service certificate, No. 49689, on the 30th day of June, 1921, and that on the date of his death his War Risk Insurance policy for $10,000 was in full force and effect, and that judgment is entered in favor of the plaintiff, Bertha Meyer Smith, beneficiary and mother named in said War Risk Insurance policy, and against the defendant, United States of America, and there is now due said Bertha Meyer Smith, as such beneficiary, upon such policy of War Risk Insurance which was carried by the said Elias Melvin Zimmerman and referred to in the complaint herein, the accrued payments of Fifty-seven and 50/100 ($57.50) Dollars per month for each month subsequent to the date of the death of said Elias Melvin Zimmerman, to-wit: the 30th day of June, 1921, and the defendant appeals from the whole of said judgment and decree.

Dated this 25 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[fol. 78] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed Oct. 26, 1932.

The United States of America, being the defendant in the above-entitled cause, and appearing by George Neuner, United States Attorney for the District of Oregon, and Rex Kimmell, Assistant United States Attorney, and having filed a notice of appeal as required by law, that the defendant appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final order and judgment made and entered in said cause against said defendant herein, now makes and files in support of said appeal the following assignments of error, upon which it will rely for a reversal of said final order and judgment upon the said appeal, and which said error is to the great detriment, injury, and prejudice of this defendant, and said defendant says that in the records and proceedings upon the hearings and determination thereof in the District Court of the United States for the District of Oregon, [fol. 79] there is manifest error, in this, to-wit:

I

The court erred in refusing to make defendant's requested Finding of Fact No. 3,

"That Elias Melvin Zimmerman enlisted in the United States Navy on March 14, 1914, and was honorably discharged therefrom on March 17, 1918; that he re-enlisted on March 18, 1918, and was regularly discharged at the termination of such enlistment on September 15, 1919; that he re-enlisted on September 16, 1919, and served continuously thereafter until the date of his death, June 30, 1921."

II

That the court erred in refusing to make defendant's requested Finding of Fact No. 6,

"That no premiums were paid on said policy of insurance, either directly by the insured or by deduction from insured's service pay, or otherwise, after the month of March, 1918."

III

That the court erred in refusing to make defendant's requested Finding of Fact No. 8,

"That prior to June 30, 1921, said policy of insurance lapsed and terminated and ceased to exist."

[fol. 80]

IV

That the court erred in refusing to make defendant's requested Conclusion of Law No. 1,

"That plaintiff is not entitled to recover for the reason that Elias Melvin Zimmerman did not have a valid and unterminated policy of war risk insurance at the time of his death."

V

That the court erred in making Finding of Fact No. 10:

"The sailor did not revoke the authority contained in his application for insurance or in any way indicate to the government or to the navy authorities his election to pay the premium in any other manner than the deductions from pay or that he desired to let his insurance lapse."

VI

The court erred in making Finding of Fact No. 11:

"At the time of his first re-enlistment, March 18, 1918, and at the time of his second re-enlistment on September 16, 1919, it does not appear that Zimmerman signed any papers whatever for the purpose of renewing previous authorization of deduction from pay for his yearly renewable term insurance, and I find no statute or regulation requiring the insured to renew the authority which in his [fol. 81] application he had conferred upon the government to deduct the premiums from his pay, Zimmerman having a continuous service certificate."

VII

That the court erred in making Finding of Fact No. 13:

"Treasury Decision 44, War Risk Insurance, dated May 17, 1919, and Treasury Decision 48, War Risk Insurance,

dated September 29, 1919, provided specifically that 'Yearly renewable term insurance will not be permitted to lapse for nonpayment of premiums while the insured is in the active military service and premiums therefor are authorized to be deducted from the insured's pay or deposit, except as hereinafter provided', and there were no exceptions applicable to Zimmerman's case, and Treasury Decision 48 of said War Risk Insurance, dated September 29, 1918, further provided that "Authorization of deductions from the insured's pay shall be equivalent of tender.' "

VIII

That the court erred in making the following Conclusion of Law:

"Therefore, in conclusion, I find that Zimmerman died June 30, 1921, while still in the service of the United States, [fol. 82] and that he had a continuous service certificate, No. 49689, and I rule that the policy of war risk insurance of Elias Melvin Zimmerman, who is one and the same identical person as Elias M. Zimmerman and E. M. Zimmerman, was in full force and effect at the time of the death of Zimmerman, and that the petitioner and plaintiff in this case, Bertha Meyer Smith, is entitled to receive the installments due thereon up to this date, as provided by law, after deducting the premiums which the government had previously failed to deduct, for which sum judgment may be entered."

Wherefore, on account of the errors above assigned, defendant prays that the judgment of this Court be reversed, and that this case be remanded to said District Court and that such directions be given that the above errors may be corrected and law and justice be done in the matter.

Dated at Portland, Oregon, this 25 day of October, 1932.

George Neuner, United States Attorney for the District of Oregon; Rex Kimmell, Assistant United States Attorney.

[fol. 83] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Feb. 25, 1933

To the Clerk of the above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said Appellate Court and expressly including therein the following documents:

Citation on Appeal.
Complaint.
Answer.
Reply.
Findings of Fact and Conclusions of Law.
Verdict.
Judgment.
Bill of Exceptions.
Petition for Appeal.
[fol. 84] Order Allowing Appeal.
Notice of Appeal.
Assignments of Error.
Præcipe.

It is hereby stipulated by and between the respective parties to the above-entitled action, that the record and transcript to be prepared by the Clerk of the Court and Transmitted to the United States Circuit Court of Appeals for the Ninth Circuit shall consist of the above-named documents, omitting titles, verifications and acceptance of service on all said documents, except Citation on Appeal and Complaint.

J. J. Crossley, Attorney for Plaintiff. Rex Kimmell, Assistant United States Attorney.

[File endorsement omitted.]

United States of America,
District of Oregon.—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing printed pages numbered from 5 to 84 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein in which Bertha Meyer Smith is plaintiff and appellee, and United States of America is defendant and appellant, in accordance with the praecipe for transcript filed by said appellant in said cause; that I have compared the foregoing transcript with the original record thereof, and that the foregoing transcript as corrected by me is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of comparing and certifying the within transcript is $10.10, and that the same has been charged against the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court in Portland in said District, this 13th day of March, 1933.

[Seal] G. H. MARSH,
Clerk.

No. 7109

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

Upon Appeal from the District Court of the United States For the District of Oregon.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated Term, to wit, the October Term, A. D. 1932 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Tuesday the sixteenth day of May in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable JULIAN W. MACK, Circuit Judge.

No. 7109

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. George Neuner, United States Attorney, counsel for the appellant, and by Mr. J. J. Crossley, counsel for the appellee, and submitted to the court for consideration and decision.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the sixth day of November in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANK H. NORCROSS, District Judge.

No. 7109

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Appeal from the District Court of the United States for the District of Oregon.

Before: WILBUR, SAWTELLE and MACK, Circuit Judges.

WILBUR, Circuit Judge:

The appellee brought this action against the government to recover on a policy of war-risk insurance issued to her son Elias Melvin Zimmerman in which she was named beneficiary.

The sole question involved in the case is whether or not the war risk insurance policy issued December 3, 1917 on the application of the insured was in effect on June 30, 1921 when he died. This question, in turn, depends upon whether or not the insurance premiums chargeable to the insured should be deemed to have been paid by him as required by the terms of the policy notwithstanding the fact that he did not in fact pay the premiums and no deductions were made from his pay therefor after the period of his enlistment which expired March 17, 1918. The facts were stipulated and may be briefly summarized as follows:

The insured enlisted in the United States Navy on March 18, 1914 at Portland, Oregon as an apprentice seaman. He served throughout such enlistment and was honorably discharged at the expiration thereof on March 17, 1918. During this enlistment, to wit, on December 3, 1917, he made applica-

tion for war risk insurance in the amount of $10,000 and at the time of his application for such insurance he expressly authorized deduction to be made from his Navy pay for the purpose of paying the monthly premiums on his insurance. In pursuance of this authorization such deductions were regularly made until the expiration of his first enlistment on March 17, 1918. He reenlisted on March 18, 1918, served throughout such enlistment, and received an honorable discharge therefrom September 15, 1919. He reenlisted the next day, September 16, 1919 and served thereafter until his death, June 30, 1921.

The insured was the holder of continuous service certificate No. 49689. Pay was due the insured for each and every day from and including March 18, 1914 to the date of his death, June 30, 1921. At the time of his discharge on September 15, 1919 the insured was paid all the money then due him by the defendant, without any deductions then or theretofore for or on account of premiums upon his policy. At the time of his death, June 30, 1921, the pay then due the insured was paid to the plaintiff, his mother, without such deductions.

From the foregoing stipulated facts it is clear that at the expiration of the second enlistment the insured was paid and accepted the entire balance due him from the government without any deduction of the premiums due and past due upon the policy of war risk insurance issued to him by the government, if such policy was in force. The continuation of this insurance by the provisions of the law and the terms of the policy was made dependent

upon the payment of the insurance premiums when due. The appellee claims, and the trial judge decided, that the insurance premiums should have been deducted from the pay of the insured when and as they accrued, by reasons of the direction to that effect given by the insured at the time he applied for his policy, as was done during the enlistment in which the policy was issued. On the other hand the government claims that the original direction was not effective after the discharge of the insured in March 1918, and that during the subsequent enlistment and at its termination by an honorable discharge both parties to the policy treated it as ended by the failure to pay premiums as therein agreed.

We have then to consider the effect of the transactions between the government and the insured during the enlistment beginning March 18, 1918 and at the time of his discharge therefrom. In view of the facts that the war risk insurance is purely a voluntary affair so far as the sailor is concerned, and that by the terms of the law and of the war risk insurance policy, and the regulations issued in pursuance of the law, the payment of premiums is essential to the continuance of the insurance, the voluntary acceptance by the insured of his full pay without deductions for premiums and without any provisions for otherwise paying the premiums, would clearly terminate the insurance by reason of the failure to pay the premiums when due in the absence of other controlling considerations. In this connection it should be noted that the method of

payment of premiums by "checking the pay account" of the sailor is a mere convenience for the benefit of the insured. By "checking the pay account" is meant the debiting of that account with the amount of the insurance premium. The appellee contends that, under the regulations issued by the Treasury, War and Navy Departments, it was the duty of the Navy paymasters in charge of insured's account to have checked his account for the amount of the war risk insurance premiums and that the failure so to do is a neglect chargeable to those officers and not to the insured, and consequently the insurance remained in effect notwithstanding this neglect.

It is conceded by the government that this position of the appellee is correct insofar as the first enlistment is concerned. Appellee's position in this case is based largely upon the theory that the insured held a continuous service certificate, and, consequently, the service of the insured was the same as though the original enlistment and the obligations of the government and of the insured under that enlistment continued throughout the entire period that the insured served as a sailor in the United States Navy, and that for the purposes of determining the rights of the government and of the sailor the discharge and reenlistment should be ignored. His service was in fact continuous, that is to say, there was no day during the entire period from his first enlistment until the date of his death when he was not in the Naval service of the government. There was, however, a hiatus in that service

due to the discharge and reenlistment. The continuous service certificate was evidence that the insured was entitled to certain rights and benefits accruing under the law by reason of continuous service. In other words, it is evident that for certain purposes the government regarded his reenlistment as a continuation of his service. The only other manner in which a sailor could serve the government continuously was by an extension of the enlistment for a period limited by statute. The policy of the government, as indicated by the legislation bearing upon the subject of enlistment, reenlistment and extension of enlistment, is to limit the period of service of the sailor to a fixed period at the expiration of which the contract of enlistment expires. In order to induce him to reenlist and to continue in the service of the government with the accruing benefit to the government of his service training certain inducements are held out to him, such as increased pay, increased rating and retirement pay. These inducements offered by the government, however, do not in any manner affect the fact that the original or subsequent enlistments are separate contracts. Each reenlistment is an absolutely new contract between the government and the sailor. The obligations assumed by the government in the event of reenlistment are different from those resulting from the earlier enlistments. These obligations are fixed by statute and by the regulations of the department and by reason thereof the sailor, who serves continuously by reenlistment or by an extension of an existing enlistment, receives an additional

consideration for the more valuable service thus rendered the government during the subsequent enlistment.

The discharge, however, under any enlistment absolutely terminates any contractual relation between the government and the sailor and the new relations assumed by each in connection with the reenlistment are entirely separate and distinct from the relations theretofore existing except as they are altered by statute or regulation applicable to the new status arising from the reenlistment. With these considerations in mind we continue the statement of facts as shown by the record.

It appears from the findings of the trial court that bulletin No. 1 issued in pursuance of §402 of the act of April 6, 1917, 40 Stats. 409, in force at the time the policy of insurance was issued to the insured, contained the following regulations relative to the payment of premiums:

> "Premiums shall be paid monthly on or before the 1st day of each calendar month and will unless the insured otherwise elects in writing be deducted from any pay due him from the United States or deposit by him with the United States and if so to be deducted a premium when due will be treated as paid whether or not such deduction is in fact made, if upon the due date the United States owe him on account of pay or deposit an amount sufficient to provide the premium; provided that the premium may be paid within thirty-one (31) days after the expiration of the month during which period

> of grace the insurance shall remain in full force; * * * in case the applicant does not desire the premium to be deducted from his pay he should so state in writing at the time of making application; but if no election is made it shall have the effect to provide for such deduction from his pay or if such pay be insufficient any balance from his deposit."

It is conceded by the government that during the enlistment in which the war risk insurance policy was applied for, issued and authority to check the pay of the insured was given, the policy would remain in force and effect under the provisions of this rule regardless of whether or not such deduction was in fact made, but the deductions had in fact been made and the insurance was in effect at the time of the discharge of the insured.

During the enlistment beginning March 18, 1918, terminated by honorable discharge in September, 1919, certain rules and regulations were promulgated with relation to war risk insurance which have a bearing upon the situation.

On November 15, 1918 the Navy Department, Bureau of Supplies and Accounts, issued an order concerning war risk insurance and formal allotments. This order provided, among other things, in sub. 5:

> "Every application for insurance which is correct, shall be recorded at once by the officer carrying the account of the applicant. A description of the insurance shall be entered on

the pay roll and a record kept similar to that kept for Navy voluntary allotments (S & A Form 6). The following indorsement will be placed in the back of every recorded application for insurance:

....., 19.....
(Day) (Month)

Recorded by me this date. Checkage of premium ($.....) will be made to me monthly from date of application.

First checkage made....., 19.....
(Day) (Month)

for $.....

.....

.....Pay Corps, USN."

Sec. 8 provided:

"Checkage of insurance premium will continue while a man is in a pay status, or until the insurance is cancelled by written request over the man's signature, forwarded through the officer of the Pay Corps carrying his account."

Sub. 11 of this order, as amended January 13, 1919, provided:

"On discharge every man having an insurance application shall be furnished with a certified copy thereof and Treasury Bureau of War Risk Insurance Form 2303, 'Information Relative to Compensation and Continuance of War Risk Insurance,' properly filled out in duplicate. He shall be instructed to forward both

copies of Treasury Bureau of War Risk Insurance Form 2303 to the Bureau of War Risk Insurance with the first remittance of premium by him. He shall be further instructed that in case of reenlistment he shall give a certified copy of insurance application to the officer of the Pay Corps taking up his pay account. The officer of the Pay Corps shall check the monthly premium and notify the Disbursing Division, Supplies and Accounts, stating the date of first checkage by him."

It will be observed that under this order the application for insurance in the first instance and upon reenlistment the deposit of a certified copy of his insurance application with the officer of the pay corps taking up his pay account are deemed to be sufficient to justify the checkage of the pay account of the insured.

We may assume then that at the time of the discharge of the insured in September, 1919 he was advised that upon reenlistment he should give a certified copy of his insurance application to the officer of the pay corps taking up his pay account. This assumption is based upon the presumption of the performance of official duty. By Treasury Decision No. 44, Bureau of War Risk Insurance, issued May 17, 1919, it was provided in part as follows:

"1. The insurance granted under Article IV of the War Risk Insurance act will not be permitted to lapse for non-payment of premium while the insured is in the active military or

naval service and premiums therefore are authorized to be deducted from the insured's pay or deposit, except as hereinafter provided. * * *"

On September 29, 1919 Treasury Decision No. 44 was revoked by Treasury Decision No. 48 whereby the word "therefor" was substituted for the word "therefore" in Treasury Decision No. 44. The difference between these two decisions is that under Treasury Decision No. 44 hereinabove quoted it might appear that the order authorized the deduction of the premium from the pay account of the insured regardless of whether or not it was authorized by the insured, whereas, under Decision No. 48, modifying the language of the earlier decision (44), it is argued by the government that the provision against permitting the lapse for non-payment of premium while the insured is in the active military naval service applies only in cases where the "premiums therefor are authorized to be deducted from the insured's pay or deposit * * *". It is claimed that this change was made to correct a typographical error in Treasury Decision No. 44. If both the insured and the government had treated the authorization for checkage made by the insured at the time of his application for war risk insurance as continuing throughout the subsequent enlistments, the checkage would have been made and the insurance premium thus paid. If, however, by some inadvertence the checkage was not made at the proper time to continue the insurance in force, the default of the officers in failing to make the check-

age if duly authorized thereto, would not have affected the rights of the insured. But where neither the government nor the insured treated the authorization in the previous enlistment as continuing in the subsequent enlistment and the insured not only failed to do that which was necessary on his part to be done to secure the checkage of his account, namely, to notify the officer of the existence of his war risk insurance by depositing with him a certified copy of his application for the insurance, and where by reason of his neglect no checking of his account was in fact made, and where, knowing as he must have known, that there was no such checkage of his account, he accepted the full amount of his pay at the time of his discharge without any deduction for premiums due and earned upon his policy, if it was in force, we are at a loss to know upon what theory we can hold that the insurance was in effect. It follows that at the expiration of the enlistment in September, 1919 the insured, by accepting the money which the appellee now claims should have been appropriated to the payment of the premium of the war risk insurance, in effect consented to an abandonment of his policy for his acceptance of the money which belonged to the government, if the insurance was in effect, cannot be considered otherwise than as a consent to the abandonment of the contract of insurance on his part and an agreement that the policy should be considered as lapsed.

We conclude then that the policy of insurance was not in effect on June 30, 1921, the date of

insured's death, and the appellee, the beneficiary named in the policy, is not entitled to recover thereon.

Judgment reversed.

[Endorsed]: Opinion. Filed Nov. 6, 1933. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 7109

UNITED STATES OF AMERICA,

Appellant,

vs.

BERTHA MEYER SMITH,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the District of Oregon, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

[Endorsed]: Filed and entered Nov. 6, 1933. Paul P. O'Brien, Clerk.

At a stated Term, to wit, the October Term, A. D. 1933 of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday the eleventh day of December in the year of our Lord One Thousand Nine Hundred and thirty-three.

Present: Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding, Honorable WILLIAM H. SAWTELLE, Circuit Judge, Honorable FRANCIS A. GARRECHT, Circuit Judge.

No. 7109

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration thereof, and by direction of the court, IT IS ORDERED that the petition of appellee, filed December 5, 1933, for a rehearing of above cause be, and hereby is denied.

[Title of Court and Cause.]

ORDER STAYING ISSUANCE OF MANDATE.

Upon application of Mr. J. J. Crossley, counsel for the appellee, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 32, of the mandate of this Court in the above cause be, and hereby is stayed to and including January 26,

1934; and in the event the petition for a writ of certiorari to be made by the appellee herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

CURTIS D. WILBUR,
United States Circuit Judge.

Dated: San Francisco, California,
December 16, 1933.

[Endorsed]: Filed Dec. 15, 1933. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and four (104) pages, numbered from and including 1 to and including 104, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellee, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the state of California, this 11th day of January, A. D. 1934.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed on cover:] File No. 38,345. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 742. Bertha Meyer Smith, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed January 25, 1934. File No. 742, O. T., 1933.